

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 917 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL  
and  
Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed : NO  
to see the judgements?
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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SCHENECTADY-BECK LTD

Versus

UNION OF INDIA  
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Appearance:

MR MIHIR H JOSHI for Petitioners  
MR ASIM J PANDYA for Respondent No. 1, 2, 3  
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CORAM : MR.JUSTICE B.C.PATEL  
and  
MR.JUSTICE P.B.MAJMUDAR

Date of decision: 04/09/2000

ORAL JUDGEMENT [ Per : B.C. Patel, J.]

#. Rule. Mr. Asim Pandya, learned advocate waives

service of rule on behalf of the respondents.

#. Petitioner by filing this petition has challenged an order made by the Commissioner of Central Excise & Customs (Appeals), Bombay.

#. In this case, the Revenue has not pressed the claim on the ground of alternative remedy but has sought to press into service 2000 [116] E.L.T. 401 [S.C.] in the case of Union of India v. Solar Pesticide Pvt. Ltd. In the instant case, claim was made before the Assistant Commissioner, Central Excise & Customs at Ankleshwar. It appears that the Assistant Commissioner was of the view that the protest was ab initio void and the claim was time barred. The Assistant Commissioner further observed that the assessment order could not have been appealed. About unjust enrichment, the Assistant Commissioner held that there was no question of unjust enrichment. The order of the Assistant Commissioner was taken in appeal before the Commissioner, Central Excise & Customs (Appeals), who arrived at a conclusion that the payments were made under protest. If that is the finding recorded, we fail to understand how a view can be taken that he is not entitled to lodge the claim. The appellate authority at page 58 in para (c) held as under.

"Since I have come to a finding that there is protest lodged at Ankleshwar plant, the refund claim will not be hit by time bar as Sec-11B(i) proviso itself provides that the limitation of six months shall not apply where any duty has been paid under protest."

In the concluding portion in para 4, the Commissioner (Appeals) has held as under.

"In this view hereinabove I will reject all the findings of the JAC except the finding that the judgment of Shakti Insulated Wires P. Ltd. 1988 (17) ELT 104 (Bom) and the company's case itself in the Pune plant will not entitle them to the refund claim. They have to fight their own battle. The appeal is therefore rejected."

#. In view of the clear finding, obviously this decision is incorrect. As pointed out hereinabove, it was held by the appellate officer [Commissioner (Appeals)] that the payments were made under protest and claim will not be hit by the bar of limitation, the matter ought to have been disposed of accordingly. However, the decision of the Apex Court in the case of Union of India v. Solar

Pesticide P. Ltd., reported in 2000 [116] E.L.T. 401 [S.C.], the authority i.e. the Assistant Commissioner of Central Excise and Customs, will have decided the matter afresh. The Apex Court in the aforesaid case held as under.

"To claim refund of duty it is immaterial whether

the goods imported are used by the importer himself and the duty thereon passed onto the purchaser of the finished product or that the imported goods are sold as such with the incidence of tax being passed onto the buyer. In either case the principle of unjust enrichment will apply and the person responsible for paying the import duty would not be entitled to get the refund because of the plain language of Section 27. Having passed on the burden of tax to another person, directly or indirectly, it would clearly be a case of unjust enrichment if the importer/seller is then able to get refund of the duty paid from the Government notwithstanding the incidence of tax having already passed on to the purchaser. Difficulty in proving that the incidence of duty borne by the importer has not been passed onto the purchaser of the finished product can be no ground for interpreting Section 27 differently. Therefore, the principle of unjust enrichment incorporated in Section 27 would be applicable in respect of imported raw material and captively consumed in the manufacture of a final product."

#. In view of the aforesaid situation, we allow this application and direct the Assistant Commissioner, Central Excise & Customs to decide the matter afresh in accordance with law. Rule is made absolute with no order as to costs.

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